THE GENESIS OF THE CORPORATION.

A FEW years ago the writer became interested in the trust problem, and after some study of the subject reached the conclusion that the corporation furnished the only means by which trusts were able to maintain their existence.[1] This naturally suggested an examination of the contrivance which was sufficiently convenient and effective to accomplish such large results. The process of forming a corporation was of course familiar, but on close inspection the thing itself seemed to merit investigation. Several persons associate themselves and comply with certain forms prescribed by law, and the result is something having an identity and existence entirely independent from these persons, and with rights, powers, and duties of its own. All the familiarity in the world with this process does not render the result other than remarkable. Nor is the phenomenon clearly explained by the well-known statements that this mysterious something is "created by the sovereign power," and that it is "a fictitious or artificial person."[2] Inevitably the inquiry arises whether the corporation represents a natural privilege, or whether it is an arbitrarily constructed species of machinery. This in turn suggests further questions: Where did the corporation come from? Who invented it? On what basic principle does it rest? In the ultimate analysis what is the corporate idea? In considering these questions it is the single endeavor of this paper to arrive at the inherent nature of the corporation. It is proposed first to discuss the matter in the abstract, and then to illustrate that discussion by specific examples.

The germ of the corporate idea lies merely in a mode of thought; in thinking of several as a group, as one. This mental process, familiar as soon as there was any conscious thought, is so nearly elemental in its nature that it has been said to defy analysis.[3] Nevertheless, as individuals are the primary units from the point of

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[1] 16 HARV. L. REV. 791.

[2] Marshall, C. J., in Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518; Cal. Civil Code, § 283; Georgia Code, § 1836.

[3] Morawetz, Law of Private Corporations, § 1, note.

view of logic, if not of history,[1] a thought which embraces several individuals must be susceptible to some extent of explanation. It is the recognition of a fact, namely, that a certain number of persons are seen or heard or in some way appear as a body, as one; they are perceived by some one or more of the senses to manifest a certain cohesion. The underlying cause or motive force which produces this perceptible cohesion is that each of the individuals in question bears precisely the same relation to some aspect or phase of existence; each has an identity of relationship to a common influence or factor. This common factor may be trivial and of momentary effect, or it may be of permanent and vital significance. For example, it may consist in ties of blood or place of residence, or it may be merely the desire to see a passing street parade. In other words, there are groups of all sorts and degrees. The persons gathered to chat on a street corner, the men who row in a college boat, the statesmen who legislate at Washington, a crowd, a crew, a congress, are groups created, it is true, by accident, and evanescent, but different in degree only from such groups as families and tribes, the members of which are considered as one because of a cohesion due to a continued identity of relationship. The mental process which we have tried to analyze, expressed in written or spoken language, results in a word which stands for several but which is itself in the singular number. We suggest therefore, without fear of being accused of confusing cause with effect, that a clear, practical definition of a group is this, namely, such a collection of individuals as may be represented by a word of the singular number. That this is not a wholly accurate test is admitted; that it constitutes a good working rule is shown by the following examples: crowd, crew, team, court, board, class, regiment, army, flock, herd, audience, congregation, party, cabinet. For the persons stopping over night at a hotel, the passengers on a train, the guests at a ball, collections of individuals not manifesting a perceptible cohesion, there is no adequate word of the singular number.[2]

Having seen that the basis of all groups is merely a mode of thought, let us analyze the process by which some groups become

[1] Sir Henry Maine intimates that the family, clan, and tribe were recognized entities of society before individuals were. Ancient Law 258.

[2] These collections of persons certainly have an identity of relationship to a common factor. It seems to the writer, however, that in the examples cited it does not produce a perceptible cohesion which leads us to think of them as groups.

more important than others. Because several individuals are perceived to manifest a certain cohesion in respect to a single episode, as in the case of a crowd on a street corner, we think of them and name them as one. Unless something further happens, that is the end of it. Frequently, however, something further does happen, and it is this: instead of being perceived as one in a solitary instance, the same several persons act or appear together on various occasions during a considerable period of time. A simple example is a quartette of musicians. The oftener this happens, the more the oneness of these same several persons is emphasized. It is necessary to think of them as a group, not once, but frequently, perhaps continuously; the group becomes established in the minds of others as something definite and lasting, and finally as something independent of the individuals who compose it. This independence is of vital importance, for it means that the persons composing the group may change and yet the group continue. A regiment of soldiers is an example of this. As the group performs acts, it demands recognition as such, not in the mind merely, but in the conduct of others towards it. The several individuals composing the group are not only thought of and named as one, but of necessity are treated as one also. The oneness, the something produced by the cohesion of several,[1] has become something which must be dealt with in practical affairs and which under certain circumstances must be recognized by the law.

The extent to which a group is treated as one by those dealing with it depends entirely on the demands of practical convenience. Very many groups which maintain a fairly active existence require recognition as such in hardly more than nomenclature, recognition which is accorded to the simplest group. Take, for

[1] It seems proper to speak of the oneness produced by several as something independent, having an existence of its own. It is proper, however, simply because the demands of convenience are so nearly, if not quite, peremptory that they must be complied with or the joint action of several cease to cut any figure as a practical matter. As far as tangible facts go, nothing is produced from the several in a group. In the last terms of accuracy a group name is merely a short way of describing several persons, their relation to one another, and the effect they have on outsiders. So the word "corporation" is, in strict accuracy, nothing but a short way of describing several persons who have peculiar attributes and definite, though complicated, relations with one another and with outsiders. If, however, every time the persons in a corporation were dealt with we had to think and say several pages of words, it would be impossible for them to become real factors in daily life in their group capacity. The oneness as a practical matter is nearly as real as the several and is but one step beyond them.

example, a college football team. It is a true group, something different from any or all of its members. During the season the eleven players are thought of as one, in practice and matches are treated as one, and as one may go down to posterity as the best or worst football team ever known. But this is the only recognition this sort of group demands. It does not touch life on its practical side. It is not apt to hold property, nor likely to get into controversies which require it to sue or be sued; it has no use for legal rights, nor need for a definite status in business or law. Some groups which are active in practical affairs are treated by the law merely as so many individuals. A partnership, for example, owns property and performs acts, but in contemplation of the law does so through its members. Facts do not require recognition of the oneness of these groups to be carried to the point of recognition in law. The demands of convenience are satisfied by the law as to co-ownership. Other groups which wage war, negotiate treaties, and make laws, such as nations and states, touch life on vital points, are of necessity treated as groups in many and important affairs; and therefore the oneness of these groups must be established on an approximately exact or at least a well-defined basis. In other words, without artificial aid such as is accorded by arbitrary command of a sovereign power, that is, by a statute, a group receives just the degree of recognition which ordinary every-day circumstances make necessary. The true corporation is nothing but a marked instance of such recognition in a high degree.

It is apparent that the same fertile germ lies behind all joint action and endeavor. The corporation, though representing perhaps the most advanced attainment of the group idea, is only one manifestation of a development which has gone on in every country under the sun having a claim to be called civilized.[1] Obviously, and this cannot be too strongly insisted upon, it was not the invention of any one man or one people. No philosopher, statesman, or lawyer sat down, cogitated, and said, "It would be convenient to give several persons acting together certain attributes and call them a corporation." Nor is the cor-

[1] "Every system of law that has attained a certain degree of maturity seems compelled by the ever-increasing complexity of human affairs to create persons who are not men, or rather (for this may be a truer statement) to recognize that such persons have come or are coming into existence." Pollock and Maitland, Hist. of Eng. Law, 2d ed., i. 486.

poration in its essentials peculiar to any country or any people, although the contrary view has been advanced by many learned writers. Blackstone, for example, says of corporations: "The honor of inventing these political constitutions entirely belongs to the Romans." [1] A study of the code and digest unquestionably had an influence on the form of the corporation of to-day, but the corporation existed in England long before Roman law-books were known in that country. There as everywhere it was the result, not of imitation, but of evolution, — a natural, though hardly inevitable, manifestation of the group idea.[2]

It is time to test our abstract discussion by the examination of facts. The truth of our inferences could be proved by the history of numberless groups which have become active at various times from the days of the Old Testament to the present. The practical importance of the oneness of groups could be shown specifically by presenting the characteristic development of the group idea manifested by the universities [3] of the middle ages, and by the great livery companies of London.[4] Naturally, however, our happiest illustration, both of the general development of the group idea and of the necessity for establishing it as something definite, lies in the story of the groups which were the immediate predecessors of the corporation.

The course of development may first be briefly indicated in general terms. When certain groups became active factors in daily life, especially in trade matters, when as groups they were accorded legal rights and were owners of property, it became necessary as a matter of practical convenience to put the several persons in their group capacity on a definite basis which could be dealt with in business and in law. The oneness, the indefinite something which is the essence of every group, in these particular groups became so accentuated and so important in respect to the most usual and practical affairs of life that it fairly vociferated for

[1] Sharswood's Blackstone's Commentaries 468.

[2] All that we have said as to groups might be true and yet never a corporation have come into existence. There may be much associate activity not in the corporate form.

[3] Masters and scholars received privileges as a class or unit. Corporations, their Origin and Development, i. 257 *et seq.*

[4] Members received by grant from the king privileges which they held as a body. See Charter of Edward III. to the Fishmongers; Charter of Richard II. to Skinners; Charter of Richard II. to the Merchant Tailors, which says: "We . . . do for us and our heirs as much as in us is by tenor of these presents grant and confirm all and singular the premises to the aforesaid Taylors and Linen Armourers and their successors forever." And generally Stubbs, Select Charters.

complete recognition. Not from fanciful considerations, but in response to the stern insistence of actual facts, it became necessary "to give to airy nothings a local habitation and a name."

The corporation in England was the joint result of certain groups in ecclesiastical life and certain other groups active in temporal affairs. For centuries the development of each was wholly independent of the other, and we may briefly consider each in turn.[1]

The starting-point of the corporation in temporal affairs was simply that certain people lived near one another. In at least this aspect of life they had an identity of interest. At first there was nothing but the fact of propinquity. There were no rights or duties except those appertaining to the several persons who lived in the locality as individuals. What they owned they owned as individuals, and what they did they did as individuals. They created towns and villages. Some of these settlements became more densely populated than others, and this was, at first at least, what chiefly distinguished a borough, the group which directly led to the corporation, from the ordinary village. This distinction was familiar at least from the early years of the thirteenth century. All sorts and conditions of people resorted to the larger center. Its population became heterogeneous. Some inhabitants held their land directly from the king, some from nobles; the borough would not become the property of any one person. Nothing intervened between it as a whole and the king as overlord of all the realm.[2]

Along with increased population, partly as cause and partly as effect, went increased trade both among the inhabitants themselves and with others. Life became more active, more complex; there was more contact with the rest of the world. Then, too, in these larger settlements the instinct for local self-government awoke and developed. It amounted to more to be an inhabitant of a large

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[1] The facts which are hardly more than suggested in the following pages are treated at length by Pollock and Maitland in their History of the English Law, 2d ed. in the chapters called "The Borough" and "Corporations and Churches." The writer cannot too highly express his admiration for the breadth of treatment, the keen thought, the wonderful industry indicated by these chapters. See also Stubbs' Constitutional History; Gross, The Gild Merchant; Adler, A Summary of the Law of Corporations; Davis, Corporations, their Origin and Development. It is obvious that this article does not pretend to be a work of original research; the writer nevertheless has verified statements as to facts from primary sources.

[2] Pollock and Maitland, Hist. of Eng. Law, i. 637–638.

center than a small one. The larger place inevitably felt its strength and importance, and as a consequence reached after what might add to the power and comfort of the persons who were and should become its inhabitants. It wanted and needed special privileges. What was equally important, it was in a position by force of its numbers and wealth to secure them from the king.

The franchises acquired by the borough from the king were principally three, namely, right to hold its own courts, right to its own customs, and freedom from toll.[1] The last was the most important in bringing out the oneness of the borough, and should receive a word of explanation. It was exemption from certain mercantile taxes or imposts which were collected all over England either by the king, through his agents, or by nobles who had acquired the right from the king. The nature of these taxes is sufficiently indicated by their names: duty on buying and selling, toll exacted in markets, passage money on merchants visiting fairs and markets, toll for maintenance of bridges, stallage, or money paid for permission to have a stall in a fair; fee for permission to trade. They constituted a considerable burden on the merchants of a community, especially when their enterprises called them to other parts of the country than their own. As a part of the grant of freedom from toll, the king gave to the inhabitants of the borough, the burgesses, the right to farm their own borough. That is, he substituted for his own toll-gatherer the burgesses, who paid him a fixed annual sum in lieu of toll. He also exempted them from paying toll elsewhere in England. Usually accompanying these privileges was the right to form a merchant gild,[2] for the purpose of better securing the right of freedom from toll. A merchant of the borough traveling to other places and standing boldly on his borough rights needed the support of an active, prudent organization. Besides, the right to take toll from strangers required to be fearlessly exercised and jealously guarded. These were the primary functions of the gild merchant.[3] The possession of free-

[1] There were many and various franchises granted. See, for privileges granted to boroughs, Charter from King John to Nottingham in 1200; from Henry II. to Lincoln in 1189; from John to Burgesses of Helleston in 1201; from Henry II. to Winchester; and generally Stubbs's Select Charters.

[2] There were other kinds of gilds long before privileges were ever granted by the king to a borough. The festive and religious gild may be traced back to the days of heathenry. Pollock and Maitland, 2d ed., i. 639; Gross, The Gild Merchant i. 174 *et seq.*

[3] A borough had two organizations, gild and governmental; each was closely con-

dom from toll with the accompanying right to have a merchant gild naturally increased the activity of the borough in degree and in variety.

These franchises came from the king, and they came in the form of a grant.[1] The operative words of a typical charter were as follows:

"John, by grace of God, King, etc. Be it known that we have granted and by our present charter confirmed to our burgesses of Ipswich our borough of Ipswich with all its appurtenances and all its franchises and freedom from imposts, to hold of us and our heirs, to themselves and their heirs, they paying into our exchequer each year on the feast of St. Michael, in behalf of the aforesaid Ipswich, the just and customary rent." [2]

There was nothing in the grant which expressly brought a legal person into existence, nothing which incorporated the borough. But in the very gift of these privileges there lurked a problem which sooner or later would require solution. Who really owned these franchises? No one asked the question at this time, and probably it was not the subject of much conscious speculation. Without doubt the offhand idea of the king was that the grant was to the individual burgesses living in a particular place; of the burgesses, that they received the privileges as individuals. A second thought on the part of either would hardly have sustained the offhand idea. Clearly the oneness of the burgesses was recognized, at least by implication.

Not only was the possession of these privileges from the first hardly to be accounted for on the theory of co-ownership of many individuals, but little by little this kind of property became subject to incidents wholly irreconcilable with any such theory. The burgesses died, and the privileges continued to be held by the burgesses who came after them.[3] The king, as the punishment for the act of

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nected, but not identical. "The Gild Merchant was a very important, but only a subsidiary part of the municipal administrative machinery, subordinated to the chief borough magistrates, though far more autonomous than any department of the town government of to-day." Gross, The Gild Merchant i. 63.

[1] It was in form and reality a grant, although the analogy of the Magna Charta, which used the words "to all the free men of England and their heirs," might suggest that it was a local law.

[2] King John's Charter to Ipswich. Gross, The Gild Merchant ii. 115.

[3] The preamble to Statute 15 Richard II., c. 5 (1392 A.D.), recites that an extension of the provisions of the Mortmain Statute is necessary, "because mayors, bailiffs, and commons of cities, boroughs and other terms which have a perpetual commonalty, and others which have offices perpetual, be as perpetual as people of religion."

one or more individuals, took away the franchises he had granted to all.[1] Sometimes the punishment continued after the old inhabitants had given place to new ones. The punishment fell not on persons, but on the community. The burgesses not only profited by their franchises, but had to maintain them. It was necessary to deal with this property in daily affairs, to defend it at law if need be. In 1200 Ipswich got a common seal, and other boroughs followed suit.[2] In 1225 the burgesses of Nottingham demised to the burgesses of Retford the tolls belonging to the former borough and arising within certain geographical limits at an annual rent of twenty marks.[3] In grants from the king the phrase "and their successors, burgesses," began to supplant the phrase "and their heirs."[4] In a word, the king treated the burgesses as a group, and the burgesses in respect to their property acted as a group. The group, and not the individuals, was the property owner.

To sum up: From the temporal development we get, by reason of the association of individuals in the same locality plus an active interest therein, especially in trade matters, a unit interest which demands and receives franchises and privileges which belong to the associated persons in a way not provided for by any of the existing theories of ownership. We get the fact of a oneness which has a place in business and law without the conscious recognition of its existence.[5] The process was vague; it was not marked off by distinct steps. The oneness of the burgesses was there all the time, as it is in every group, but many years had to elapse and many unconsidered acts to be done before it emerged from the mist as something definite and real.

Meanwhile the group idea was developing in ecclesiastical life. For wholly different reasons religious groups were formed. There the association depended, not on accident of locality, but on the voluntary act of individuals. From the first there was a tendency of churchmen to come together. The basic doctrines of the Chris-

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[1] Riley, Chronicles of London 11, 15, 18, 22; P. Q. W. 160. There is record that once in such a case the Londoners prayed that only the guilty might be punished. Riley, Chronicles 84.

[2] Gross, The Gild Merchant ii. 119, 121.

[3] Pollock and Maitland, 2d ed., i. 95.

[4] King John's charter for Waterford: Chartae, Privilegia, et Immunitates, Irish Record Commission 13. Cited in Pollock and Maitland i. 677. This was a step in advance, but the idea of plurality is still suggested.

[5] Pollock and Maitland say the necessity for a new idea existed at least before the end of the thirteenth century. History of English Law, 2d ed., i. 687.

tian church require coöperation and also continuity of thought and effort. It was inevitable that churchmen should join together to spread their belief, to do works of charity, to study, to honor a favorite saint. Monasteries, convents, and chapters[1] were the result.

These religious groups did not touch life so closely on the practical side as did the borough. At first, at any rate, they were not property owners although they managed property. As a group they were not so likely to deal with others in respect to merely business affairs. Nevertheless the members of the group were closely associated. Joint action was required; meetings were held and votes taken. In particular the oneness of the ecclesiastical groups was from the first recognized as independent; that is, the personnel of the group changed, but the group went on.[2] As the property managed by the religious groups became more valuable, the oneness of these groups became something to be reckoned with in practical affairs.

To sum up: From the ecclesiastical development we get organizations of individuals formed for different purposes and by voluntary association, which have a continuous existence and which are recognized as units.

We have then a unit interest or oneness which, as exemplified by both temporal and ecclesiastical groups, owned or managed property, dealt with outsiders, — in a word, was an active factor in affairs. It was time that the indefinite something produced by the association of several be given a name and its status established.[3] The facts called for a new legal theory. To construct one was not a simple matter. There was much blind groping after the nature of this indefinite something. For a time the idea naturally sug-

[1] Davis, in "Corporations, their Origin and Development," says that corporations may have their origin by means "of such changes in the supreme organization of society as to leave some of its groups, retaining their old organizations, in an exceptional relation to it." He instances cathedral chapters. This may be true as to corporations. Manifestly it cannot apply to the origin of simple groups.

[2] As to this, Bracton says (f. 374 b): "If an abbot, prior, or other collegiate men demand land or an advowson or the like in the name of their church on the seizin of their predecessors they say 'and whereof such an abbot was seized in his demesne,' etc. They do not in their count trace a descent from abbot to abbot, or prior to prior, nor do they mention the abbots or priors intermediate (between themselves and him on whose seizin they rely), *for in colleges and chapters the same body endures forever, although all may die one after the other and others may be placed in their stead; just as with flocks of sheep, the flock remains the same though the sheep die.*"

[3] "The law is slowly coming to the idea of a corporation by dealing with corporations (if we may call them so) of very different kinds." Pollock and Maitland, 2d ed., i. 494.

gested by the analogy of the human body was applied to these groups. The chief officer, as mayor or bishop, was the head, and the members were the arms, legs, etc.[1] This was called the anthropomorphic theory, and for a long time obscured the true corporate idea.[2] Finally, however, the oneness of these groups was given a definite recognition, not as a real but as an ideal or legal person.

The conception of an ideal person having legal rights and duties was borrowed directly from the early English theory as to church ownership, a theory attained not without difficulty. In very early times, several centuries at least before the reign of Edward I., there were in England what were vaguely known as church lands.[3] At first the land was given direct to God. Such a dedication came naturally and spontaneously. The Deity was vaguely conceived of as a property holder; the incidents of ownership were not considered. Sometimes the land was given to a saint;[4] such a saint was frequently buried in a particular church and was supposed to protect and guard it. So little by little the saint and the church, the actual building, became merged in each other, and finally the church itself was thought of as a property holder. The institution, the structure of stone and wood, together with its spiritual attributes, was personified. About this time church lawyers, the canonists, discovered the *universitas* in the Roman law books and applied it to the church. The theory of an ideal person was attained.

Although the church was the property owner, the functions of ownership were necessarily performed by human beings, by the clergy. The personified institution could not collect moneys, nor make conveyances, nor bring and defend suits. The group of

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[1] Abbot of Holme *v.* Mayor, etc., of Norwich, Y. B., 21 Edw. IV. f. 69. And see Y. B., 21 Edw. IV. f. 15, f. 68, per Vavisour.

[2] Pollock and Maitland, 2d ed., i. 491, 492, and citations of Year Books there given.

[3] In the earliest Christian times in England when a man built a church on his land it was his church, just as a house or shed built on his land was his. This remained true to some extent at the time of William the Conqueror (Doomsday Book II. 290 b). But the Bishop or other ecclesiastical dignitary in the locality could withhold the spiritual attributes necessary to convert the building into a true church by refusing to consecrate it unless the priest was provided for. Pollock and Maitland, 2d ed., i. 498, 499.

[4] As in charter from King Ethelbert to Rochester Cathedral, 604 A. D. "To thee, Saint Andrew, and to thy church at Rochester where Justus the Bishop presides, do I give a portion of my land." Kemble, Cod. Dipl., i. No. 1; Stubbs and Haddann, iii. 52; Councils and Ecclesiastical Documents relating to Great Britain and Ireland.

clergy was not the *universitas*, but represented it. As the clergy advanced in practical importance while the institution receded, the theory of the ideal person was unconsciously transferred from the church to them. Being primarily the personification of an institution, the theory naturally was extended to cases where there was only one cleric. Thus was introduced that curious anomaly, not really a corporation at all, namely, the corporation sole.[1] We have shown that the theory was constructed primarily not to represent the oneness produced by the association of several, but, on the contrary, merely as a "feigned substratum for rights." This explains why the ecclesiastical corporation was called not only a person but a fictitious person.

The groups in lay and church life alike represented the genuine development of the corporate idea. In the ecclesiastical groups, however, appeared so many manifestations not germane to the development[2] that it is no wonder centuries elapsed before the two sets of groups, lay and clerical, were brought under one head. In the fourteenth and fifteenth centuries, however, church and state came more closely together. The corporate development of each became common knowledge, and lay and ecclesiastical groups were established on the same basis.

In the foregoing it has been impossible to assign precise dates to the events narrated, or to treat them in the order in which they occurred. Much that has been given in sequence, in reality went on at the same time. The effort has been to select the salient characteristics of the development and present them in a somewhat

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[1] Blackstone says (Commentaries, p. 468): "But our laws have considerably refined and improved upon the invention, according to the usual genius of the English nation, particularly with regard to sole corporations consisting of one person only, of which the Roman lawyers had no notion; their maxim being that *tres faciunt collegium*." Pollock and Maitland, on the other hand, with what seems to the writer wholly adequate reason, call the corporation sole "*that unhappy freak of English law*." Hist. of Eng. Law, 2d ed., i. 488, note 1.

"The idea of a corporation sole has been claimed as peculiar to English law, but the novelty consists only in the name; and it has been justly remarked that, 'as so little of the law of corporations in general applies to corporations sole, it might have been better to have given them some other denomination.'" Dr. Wooddeson, Vinerian Lectures i. 471, 472.

[2] Problems which in themselves were difficult were made yet more difficult by the slow growth of the idea that the head of the monastery, though he is a natural person, is also in a certain sense an immortal, non-natural person, or corporation sole, and is likewise the head of a corporation aggregate. Pollock and Maitland, 2d ed., i. 436. In ecclesiastical affairs "the corporation aggregate was almost resolved into a mere collection of corporations sole." *Ibid.* 507.

logical order. The facts are not important as facts, but as indicating the inherent nature of the corporation.

To sum up: The unit interest or oneness produced by the association in different ways of several persons became such an active factor in practical affairs that people were forced to recognize it as something independent. The oneness had to be given a place in business and in law as something definite.[1] It happened that the basis of a person[2] was adopted; unfortunately, through the influence of a theory entirely proper where it belonged, namely, in church ownership, this person was called a fictitious person. Unfortunately, because the word "fictitious" or "artificial" says more than is necessary, connotes something far removed from the practical everyday affairs of life; signifies feigning or make believe. A corporation is really a collection of flesh-and-blood individuals who have an identity of interest in certain affairs. Neither the individuals nor the relation they bear to one another is fictitious. The mechanical necessity of the case requires that these individuals in their group capacity be put upon some definite basis, and they are therefore treated as a single person. But there can hardly be said to be anything unreal about the matter. A nation represents merely the relationship of certain human beings to one another, but we should hardly call the United States or England a fiction.[3]

The corporation, then, grew by nature. It was the product of a natural evolution. During all the period with which our discussion has concerned itself there was no rule that the corporation must have some definite and authoritative commencement. There was no rule that the corporation must be erected, set up, made, by act of the sovereign power. By the middle of the fifteenth century, however, it was settled as a matter of positive law that the corporation must be created by the sovereign power.[4] This rule arose simply from considerations of political expediency. It was

[1] Pollock and Maitland call the personality of a corporation "a blank form of legal thought." History of English Law, 2d ed., i. 486.

[2] "Now the words 'person' and 'personality' seem to be appropriate words, and if they were not at our disposal we should be driven to coin others of a similar import." *Ibid.* 488.

[3] In an article not called to his attention until the present article was ready for the printer the writer is gratified to find certain views which seem to be in accord with those here presented. See "The Personality of the Corporation and the State," by W. Jethro Brown, 21 Law Quarterly Review 365.

[4] Y. B. 14 Henry VIII. f. 3 (Mich. pl. 2), P. Q. W. 18; Gross, The Gild Merchant ii. 34.

recognized that boroughs, organized communities, might be dangerous. It would not do for the sovereign power to have them exist too freely. This reason also applied to the gilds which were likely to become aggressive. Here too was a good source of revenue. The privilege of being a borough or the right to form gilds would be bought. The rule of law was based, like other rules of law, on public safety and convenience.

We have seen that the oneness of the borough was definitely recognized in practice by the king and by others, by the community long before this rule of law was thought of.[1] And this recognition came by common consent as something required by the necessities of the case. When this rule of law was established, therefore, it really meant: recognition of corporations cannot continue without the king's express consent. The sovereign's act was not creation, but permission. In other words, the king's charter of incorporation performs no magic. Beyond peradventure the group person is not fashioned out of nothing by the sovereign power. If there be magic anywhere, it lies in the mode of thought which considers several persons for certain purposes as one, plus the actual happenings which make the thought important. Nevertheless, from the time when this rule of law became established the permission was given in form as though it were creation.[2] This was without doubt due not to accident, but to the necessity of defining with exactness the powers and duties of the group person permitted to exist. The oneness of several recognized by the community, even though recognized as a person, would be somewhat vague in these respects. Therefore charters of incorporation have universally said in so many words "incorporate"; that is, they have in form expressly set up or created the legal person. This made it necessary to account by some theory for the corporations already existing which had never been expressly incorporated. It was said that such were corporations by prescription.[3]

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[1] "The formal incorporation of boroughs in the fourteenth and fifteenth centuries did not materially alter the town constitution; it was in most cases merely a recognition of existing franchises with a stronger accentuation and a more precise formulation of the right of independent action as a collective personality with a distinctive name, — especially as regards holding real property." Gross, The Gild Merchant ii. 95.

[2] In 1440 the first municipal charter of incorporation was granted by statute of 18 Henry VI. c. 6. By its terms the mayor, burgesses, and their successors, mayors and burgesses of the town of Kingston-upon-Hull, are incorporated so as to form "one perpetual corporate commonalty" by the title of "The Mayor and Burgesses" of the said town.

[3] Jenkins *v.* Harvey, 1 Gale 457.

The fact that permission of the sovereign was given in the form of creation, however, had another and a far greater effect on corporate law: an effect of capital importance. If permission only were given, the corporation could never be very different from the group person called into existence by common consent, by the recognition of the community. It would be no more than a species of machinery which facts made necessary in order that complex situations might be better handled and civilization advance. The opinion as to what was necessary would change, but the corporation would always depend upon the general opinion of the community. There could never be anything arbitrary in its character. If, however, the corporation were created by the sovereign, its powers and characteristics would depend not on the consent of the community, but on the will of the sovereign. In other words, corporations came to be things made according to the ideas of the sovereign. Even so, it was long before the sovereign went in advance of the general opinion, and corporations were for a long time limited to endeavors strictly for the public.

Gradually, however, the corporation came to be used in private enterprise. It was recognized by business men as a species of machinery having great advantages over an individual, and they proceeded to adapt it for their purposes. The rule of law that the corporation is created allowed persons selfishly interested to have their own ideas recorded by sovereigns that knew little of the subject. Particularly in this country and within the last forty years the corporate idea has been seized and developed with Yankee ingenuity to a point which in the light of the genesis of the corporation is startling.

A corporation which in business affairs can do practically anything and everything that can be done by an individual and can do it anywhere and everywhere [1] is a long distance from the true corporation which was brought into existence by absolute necessity, which was recognized simply because the progress of events demanded its recognition, which was the result of natural growth, of logical evolution. The modern corporation is the product of arbitrary legislation struck off at a given time. It does not represent the natural growth of the corporate idea, but rather is a distorted application of that idea. Serving as a buffer between

[1] See Charter of United States Steel Corporation, and, generally, forms in Dill on New Jersey Corporations.

questionable acts and their natural consequences, it has been used to bring about a state of affairs in the commercial world which rests on neither a just nor a sound basis.[1] If existing conditions are to be improved, it must be by intelligent amendment of our corporation laws. An exact standard by which to measure proposed legislation is not to be hoped for; but in a clear understanding of what a corporation really is we may find both guidance and authority for action.

Robert L. Raymond.

BOSTON, February, 1906.

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[1] A Statement of the Trust Problem, 16 HARV. L. REV. 79.